



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Adams Industrial Services, Inc.

File: B-280186

Date: August 28, 1998

Thomas D. Adams for the protester.

Linda M. Harding, Saint Lawrence Seaway Development Corporation, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a timely size protest was filed after small business set-aside award, and the awardee was found by the Small Business Administration to be other than a small business, the agency, in the absence of legitimate countervailing reasons, should have terminated the contract and made award to the protester.

DECISION

Adams Industrial Services, Inc. (AIS) protests the decision of the Saint Lawrence Seaway Development Corporation (SLSDC) to cancel a purchase order issued to AIS and the subsequent issuance of a purchase order to Atlantic Testing Laboratories (ATL) under request for quotations (RFQ) No. DTSL55-98-Q-PO414, issued as a small business set-aside by the SLSDC for nondestructive testing of fracture-critical welds on 34 stoplogs¹ and inspection of repair work at the Eisenhower and Snell Locks near Massena, New York. The protester argues that, after receipt of quotations, the SLSDC improperly permitted ATL to correct an alleged error in its certification concerning its small business status, and maintains that ATL is ineligible for award because it is not a small business.

We sustain the protest.

Background

The RFQ was issued on April 16, 1998, as a total small business set-aside, and contained Standard Industrial Classification (SIC) code 8734, with a size standard of \$5 million. RFQ at 1. Section K of the RFQ contained the clause found at Federal Acquisition Regulation (FAR) § 52.212-3, which, among other things,

¹Stoplogs are steel structures which form temporary dams used when water is being removed from a lock.

required offerors to certify whether they are small business concerns and to certify their average annual gross revenues for the last 3 fiscal years.

Eight firms, including AIS and ATL, responded to the RFQ by the time set on May 19 for receipt of quotations; ATL's quotation was low and AIS's quotation was second low. ATL certified itself as a small business, but also certified that it had average annual gross revenues for the last 3 fiscal years ranging between \$5 and \$10 million, which exceeded the \$5 million size standard stated in the RFQ. On May 21, the contracting officer contacted ATL regarding its size status. In response to the contracting officer's inquiry, ATL stated that it was a small business under SIC code 8734, and that the firm's average annual gross revenues attributable to that SIC code for the last 3 fiscal years were below \$5 million. ATL further explained, however, that it did not qualify as a small business concern if all its affiliates were included in the calculation of gross revenues. Based on ATL's explanation, the contracting officer determined that ATL was not eligible to receive award under the RFQ and issued the purchase order to AIS. Subsequently, by letter dated May 26, ATL informed the contracting officer that its quotation should have reflected average annual gross revenues attributable to SIC code 8734 of between \$3.5 and \$5 million, thus making ATL an eligible small business under the RFQ.

The contracting officer then contacted the Department of Transportation (DOT), Acquisition and Grant Management Office, and the DOT Office of Small and Disadvantaged Business Utilization for a clarification of the term "affiliates" as used in FAR § 52.219-6, Notice of Total Small Business Set-Aside,² which was incorporated by reference in the RFQ. According to the SLSDC, on May 27, both offices responded that only a firm's average receipts attributable to the activities covered by the SIC code applicable to the procurement should be counted, and that the receipts of affiliates in a different line of business should not be included. On May 27, the contracting officer canceled AIS's purchase order and issued the purchase order to ATL. On May 29, AIS filed this protest in our Office.³

By letter dated May 30, AIS protested ATL's size status to the contracting officer, who forwarded the matter to the Small Business Administration (SBA). On June 19, the SBA determined that ATL is other than small; the SLSDC received SBA's

²Under FAR § 52.219-6(a), a small business concern "means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in the solicitation."

³On June 3, the SLSDC determined, pursuant to FAR § 33.104(c)(2), that urgent and compelling circumstances that significantly affect the interests of the government would not permit waiting for our decision on this protest and authorized ATL to continue performance of the contract.

determination on June 23. In its size determination, SBA stated that in computing a firm's average annual receipts, all revenues should be counted, not merely those attributable to the activities covered by the SIC code applicable to the procurement. The SBA further stated that the receipts of the affiliates must be included even if they are in a different line of business.

The SLSDC, however, did not disturb the award to ATL because the size protest was filed after the award had been made. According to the agency, under FAR § 19.302(j), SBA's size determination has prospective application but does not affect the award.

Discussion

The protester argues that because of ATL's apparently inconsistent certifications, the contracting officer should have referred the question of ATL's size status to the SBA prior to award. The protester also argues that, after receipt of quotations, the SLSDC improperly permitted ATL to correct the certification in its quotation indicating that it had average annual gross revenues greater than the size standard specified in the RFQ. AIS also maintains that ATL should not be permitted to perform the work because it is not a small business.

A contracting officer may properly rely on an offeror's self-certification that it is a small business unless he has information prior to award that would reasonably impeach the certification. 13 C.F.R. § 121.405(b) (1998); Fiber-Lam, Inc., B-237716.2, Apr. 3, 1990, 90-1 CPD ¶ 351 at 4. In the absence of a size status protest from an offeror, there is no absolute requirement that the contracting officer refer size status questions to the SBA. Rather, this is a matter of discretion, the exercise of which must be measured against a standard of reasonableness in the particular case. The H.J. Osterfeld Co., B-257630, Oct. 24, 1994, 94-2 CPD ¶ 150 at 4.

Here, after she received ATL's May 26, 1998 letter, in an effort to investigate the question of ATL's size, the contracting officer contacted the DOT's Acquisition and Grant Management Office and the Office of Small and Disadvantaged Business Utilization for clarification of the term "affiliates" as used in FAR § 52.219-6. The agency states that both offices explained that only a firm's average receipts attributable to the activities covered by the SIC code applicable to the procurement should be counted. Even though this advice proved to be incorrect, we think that the contracting officer, in light of the source of the advice and in view of the information ATL provided in its letter, had no reason to question ATL's size status prior to issuance of the purchase order to that firm.

Moreover, the contracting officer properly permitted ATL to correct its certification after the firm submitted its quotation, since the issue of whether a firm is a small business under the applicable size standard relates solely to the firm's status and eligibility for award and may be resolved after the submission of a quotation on the

basis of information outside the quotation. Nortex Corp., B-224930, Jan. 6, 1987, 87-1 CPD ¶ 12 at 4-5. Failure to properly complete the small business size status certification is a minor informality that can be corrected even under the strict rules governing sealed bidding, and is thus certainly correctable in the context of quotations. See, e.g., Lioncrest Ltd., Inc., B-221026, Feb. 6, 1986, 86-1 CPD ¶ 139 at 5.

Nonetheless, we do not think the award made to ATL should be allowed to stand. In Diagnostic Imaging Tech. Educ. Ctr., Inc., B-257590, Oct. 21, 1994, 94-2 CPD ¶ 148 and American Mobilphone Paging, Inc., B-238027, April 5, 1990, 90-1 CPD ¶ 366, we addressed facts very similar to those here and concluded that two circumstances--the size protest was timely filed and the awardee did not appeal the SBA's determination--militated in favor of termination of the awardee's contract and award to the small business protester. Both circumstances are present here.

First, although AIS filed its size status protest after award, it could not have done otherwise because, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors, and none was issued here. See FAR § 13.106-3(c). Because the size protest was filed within 5 days of AIS receiving notice from the SLSDC of the issuance of a purchase order to ATL, it was timely under SBA's size status regulations. 13 C.F.R. § 121.1004(a)(2).⁴ Second, ATL did not defend its size certification by appealing SBA's determination.⁵

While FAR § 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract, SBA's regulations, which we view as controlling in this area, provide that "[a] timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest." 13 C.F.R. § 121.1004(c). Moreover, in the absence of countervailing reasons, we view it as inconsistent with the integrity of the competitive procurement system and the intent of the Small Business Act, 15 U.S.C. §§ 631-657a (1994), for an agency to permit a large business, which was ineligible under the terms of the RFQ, to continue to perform. Diagnostic Imaging Tech. Educ. Ctr., Inc., *supra*.

⁴While the SLSDC argues that AIS should have filed its protest by May 24 (within 5 days after receipt of quotations), AIS had no reason to challenge ATL's size until it learned that its purchase order had been canceled and an order issued to ATL on May 27.

⁵In its agency report to our Office, the SLSDC states that subsequent to award, when informed of SBA's adverse size determination ATL stated that it would be appealing SBA's decision. SBA has informed our Office, however, that ATL has not appealed the size determination.

Conclusion and Recommendation

We conclude that SLSDC's decision to allow ATL's selection to stand notwithstanding SBA's determination that ATL is other than small was improper, and we sustain the protest on this basis. Although our Office asked the agency to address whether it would be appropriate to terminate the purchase order issued to ATL, the agency failed to respond. In the absence of countervailing reasons and in view of the nature of the work involved here, we conclude that it would be feasible to terminate the purchase order issued to a business that has been determined to be other than small and have a small business complete the work.

Accordingly, we recommend that the purchase order issued to ATL be terminated in accordance with FAR § 13.302-4, and a purchase order for the remainder of the requirement be issued to AIS, if that firm is otherwise eligible. AIS is also entitled to its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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